Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1571

In The

Supreme Court of the United States

October Term, 1988

THOMAS H. DE LORENZO, MARLENE S. DE LORENZO AND HILLS OF WARREN,

Petitioners,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: May 25, 1989

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QUESTION PRESENTED

Whether the Petition for a Writ of Certiorari should be denied because the state court decision holding that title to the "Round Valley" property be transferred to High Point Sanitation Company from the corporate shareholders, officers and directors individually rested on adequate and independent state grounds and did not implicate petitioners' federal and state constitutional rights.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, State of New Jersey, Department of Environmental Protection, respectfully prays that this Court deny the Petition for a Writ of Certiorari because the state court judgment was based on independent and adequate state grounds and did not implicate petitioners' federal or state constitutional rights.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 28 *U.S.C.* §1257, the petitioners are seeking to have this Court review the judgment of the New Jersey Supreme Court. That court never rendered a decision on the merits of this case because it dismissed the appeal upon determining that certification had been improvidently granted. Therefore, petitioners are actually seeking review in this Court of the judgment of the Appellate Division of the Superior Court of New Jersey. The final decision of the Appellate Division was based upon adequate state grounds, independent of the federal issue that petitioners unsuccessfully asserted below. Thus, this Court lacks jurisdiction to grant the petition for *certiorari*.

STATEMENT OF THE CASE

This appeal stems from a 1986 decision of the Chancery Division of the New Jersey Superior Court, which held that a property that had been purchased and maintained primarily with corporate funds, but where title had been placed in the names of the individual corporate shareholders, officers and directors, was equitably an asset of the corporation and that title be transferred to the corporation forthwith. (App. 5)* Petitioners Thomas H. De Lorenzo and Marlene S. De Lorenzo** are two of the

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* Hereinafter respondent shall refer to the appendix to the petition for writ of *certiorari* as "App."

** Hereinafter respondent shall refer to petitioners Thomas H. De Lorenzo, Marlene S. De Lorenzo and Hills of Warren as the "De Lorenzos."

shareholders, officers and directors of High Point Sanitation Company ("High Point"), a New Jersey corporation that owns and formerly operated a sanitary landfill and solid waste hauling business in that state. (App. 7). The sanitary landfill ceased accepting solid waste in October 1983 after the NJDEP rejected High Point's plan for expansion of operations onto adjacent vacant land, commonly referred to as the "Round Valley" property. The NJDEP directed High Point to immediately commence proper closure activities at the landfill in accordance with the New Jersey Solid Waste Management Act ("SWM Act"), *N.J.S.A.* 13:1E-1 *et seq.*, and the New Jersey Sanitary Landfill Facility Closure and Contingency Fund Act, ("Closure Act"), *N.J.S.A.* 13:1E-100 *et seq.*

In May 1984 the NJDEP filed suit to compel High Point to comply with its statutory obligations and begin closure activities. After a plenary hearing, the Chancery Court found High Point liable under the SWM Act and the Closure Act for the proper closure of its landfill. The trial court determined that High Point's president, Thomas De Lorenzo, had proven unreliable to carry out the closure activities and appointed NJDEP Commissioner Robert E. Hughey to be receiver of the corporation to close the landfill and continue operating the hauling business. Commissioner Hughey immediately sought a modification of the Court's ruling and requested that he be appointed receiver only for the purpose of supervising the proper closure of the landfill. The trial court so modified its decision.

The Commissioner as Receiver was given custody of a parcel of land owned by High Point to be sold if

necessary to raise the monies needed for closure.* He was also awarded custody of the Company's earth-moving equipment to aid in accomplishing the closure. He was also given access to High Point's two statutorily-required escrow accounts specifically established for closure expenses. The Commissioner was permitted to review the Company's books and records. Thomas De Lorenzo was permitted to continue managing the solid waste hauling business for which he was allowed access to the corporate bank accounts and any equipment needed for operations. The trial court hoped that the hauling business would generate profits to be used to meet High Point's statutory liability for closing its landfill.

A review of High Point's books and records by NJDEP revealed that the Company had advanced several hundred thousand dollars to the Hills of Warren, a general partnership comprised of the four De Lorenzos, High Point's shareholders, officers and directors, for the purpose of purchasing the "Round Valley" property for $280,000. Further investigation by NJDEP disclosed that, but for $26,000 that had been contributed by Thomas and Marlene De Lorenzo personally, the corporation had provided the initial deposit of $5,000 for the purchase and had "loaned" Hills of Warren approximately $74,000. High Point had also furnished the funds for the monthly payments on two mortgages, one taken by the De Lorenzos individually and one taken by Hills of Warren. (App. 9 to 11). In addition, the Company had paid the

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* This property was subsequently sold and the net proceeds of the sale turned over to the receiver to use towards the landfill closure.

municipal property taxes on the 280 acre parcel since the purchase in 1975. This was reflected on the corporate financial statements as "real estate expenses."

A portion of the monies furnished by High Point for the "Round Valley" property was reflected on the corporate balance sheets as "Assets – Other Accounts Receivable" and remained unchanged at $200,912.90 at least from the time of the Receiver's appointment in mid-1984. None of the De Lorenzos or the Hills of Warren ever executed any note or any other type of debt instrument to formalize the "loans" made by High Point. (App. 11). The directors never formally approved the loan for the purchase of the "Round Valley" property at a meeting, nor did they ever pass a resolution to that effect. (App. 11).

Upon learning of the circumstances behind the "Round Valley" purchase, the NJDEP moved for and was granted leave to amend its complaint to add Thomas H. De Lorenzo, Marlene S. De Lorenzo, Doris De Lorenzo, Harry De Lorenzo, Jr., the Hills of Warren and East Penn Sanitation Company* as defendants. Respondent sought to have the "Round Valley" property declared an asset of High Point.

After conducting a trial, the court declared, based on the afore-described circumstances surrounding the

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* East Penn Sanitation Company, a Pennsylvania corporation established by Thomas and Marlene De Lorenzo to conduct solid waste transfer and hauling activities primarily in Pennsylvania, was named defendant in order for the NJDEP to gain access to review the corporate books and employment records, an issue that is unrelated to the issue in the instant appeal.

purchase, the "Round Valley" property to be an asset of High Point and ordered all four De Lorenzos and the Hills of Warren to immediately convey their interests in the property to the corporation by delivering the deed by May 16, 1986.* (App. 21). The trial court determined that, as High Point's shareholders, directors and officers, the De Lorenzos had breached their fiduciary duty to the corporation by acquiring the "Round Valley" property for themselves and not turning over the opportunity to purchase the property to High Point, especially since it was likely that the landfill would need the additional adjacent land in order to expand its operations. (App. 7 to 8). Since all of the corporate shareholders, officers and directors were aware of the opportunity to purchase the property, there was no breach of a fiduciary duty in the classic sense, but rather a situation where corporate assets had been wrongfully used to acquire the property in the names of the De Lorenzos individually (App. 8 to 9). The court found that there was a "substantial lack of formality and lack of attention to . . . the procedures in the way in which these so-called loans were treated." (App. 12).

In light of differences between the corporation's interests and its shareholders' interests and the company's involvement in an industry with "important public implications," the court determined that High Point should not have deprived itself of significant assets which it would need both to continue operating the landfill and to close it properly when it reached capacity.

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* Default judgments were entered against Doris De Lorenzo and Harry De Lorenzo, Jr. as they filed no responses to the amended verified complaint.

(App. 18 to 19). The trial court therefore concluded that it was equitably fair and necessary to treat the purchase as belonging to High Point given the Company's duty to the public and its contribution of nearly all of the funds for the purchase and maintenance of the "Round Valley" property. (App. 19). The proceeds of the sale of all or a portion of the property would be used to contribute to the funds needed to properly close the landfill, which would cost approximately six to eight million dollars.

> [T]he corporation needs the benefit of a sale of [the] lands . . . and the way in which corporate funds were used to purchase all of the land . . . makes it fair insofar as the De Lorenzos are concerned to require all of the land to be treated as a corporate asset. [App. 20].

High Point was ordered to make the property available to the Receiver to assist in the landfill closure, the cost for which High Point had already been found to be statutorily liable. The NJDEP was directed to pay Thomas and Marlene De Lorenzo the $26,000 they had personally contributed toward the "Round Valley" purchase plus simple interest to be computed from the date of purchase (App. 20 to 21). Judgment was entered on May 3, 1986. (App. 1).

Soon thereafter the NJDEP sought relief from the trial court for the defendants' failure to comply with the terms of the judgment. The court directed that title be conveyed to High Point by the filing of the certified copy of the judgment with the County Clerk's Office and restrained the corporation from selling, transferring or in any way disposing of the property until the appeal was concluded.

Defendants De Lorenzo, Hills of Warren and East Penn challenged the decision in the Appellate Division of the New Jersey Superior Court, which affirmed the trial court in an opinion *per curiam* on December 5, 1987 (App. 27). The appellate court essentially relied on the extent to which High Point had contributed to the purchase and maintenance of the "Round Valley" property, disregarding the issues concerning the initial purpose for acquiring the land and the strict applicability of the corporate opportunity doctrine. The appellate court found that the trial record amply supported the lower court's findings and conclusions. Finally, the Appellate Division rejected appellants' claim of unconstitutional deprivation of property since the trial court decision provided for "the corporation as a condition of taking this property back to repay to Thomas and Marlene De Lorenzo the sum of $26,092.28 plus interest." (App. 21).

The petitioners then filed both a notice of petition for certification and a notice of appeal with the New Jersey Supreme Court. Upon consideration of all of the papers filed by both parties and after hearing oral argument by counsel, on December 19, 1988 the New Jersey Supreme Court dismissed the appeal, having determined that certification had been improvidently granted. (App. 31).

Petitioners filed a petition for writ of *certiorari* to the New Jersey Supreme Court with this Court on or about March 23, 1989. Respondent respectfully submits the within brief in opposition thereto.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT DECISION HOLDING THAT TITLE TO THE "ROUND VALLEY" PROPERTY BE TRANSFERRED TO HIGH POINT SANITATION COMPANY FROM THE CORPORATE SHAREHOLDERS, OFFICERS AND DIRECTORS INDIVIDUALLY RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND DID NOT IMPLICATE PETITIONERS' FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

The issue that was decided by the trial court and affirmed by the Appellate Division was whether the "Round Valley" property should be declared to be an asset of High Point in light of the substantial contributions of the corporation to the purchase and subsequent maintenance of the property, as well as the minimal participation of its record owners, who were the corporate shareholders, officers and directors. Of critical importance to this case is the fact that title in the property was ordered transferred to *High Point*, not to the State, as petitioners contend. The only role that the NJDEP Commissioner may play is to sell all or part of the land to obtain the funds needed for the closure of the corporation's landfill, the specific task for which the Receiver was appointed. Proper closure is an obligation of the corporation and will be accomplished as much as possible by the expenditure of corporate funds.

Petitioners now raise the issue before this Court that their private property was taken for public use without

just compensation or due process of law.* The trial court decision is silent on this issue. The Appellate Division, however, expressly rejected petitioners' claim that they were unconstitutionally deprived of their property because the trial court had found that the subject property was in equity an asset of the corporation, "particualarly in light of the use of High Point assets to purchase and maintain the property." (App. 30).** The trial court judgment provided for reimbursement to Thomas and Marlene De Lorenzo for the amount of their contribution to the property's purchase plus interest. The Appellate court was satisfied "that the record fully supports Judge Stanton's findings and conclusions" regardless of the

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* If the trial court had appointed a private citizen to be receiver of High Point for the purpose of supervising the landfill closure, the petitioners would be hard pressed to raise the taking issue since only private parties would be involved. However, the selection of the NJDEP Commissioner as the receiver for High Point prompted petitioners to erroneously claim that a taking by the State had occurred in spite of the fact that title to the "Round Valley" property was transferred to the *corporation*, and not to the State. Irrespective of whether the receiver is a public or private citizen, his duties remain the same and do not implicate federal constitutional rights.

** Since the New Jersey Supreme Court dismissed petitioners' appeal "having determined that certification was improvidently granted" (App. 31), that order is not ordinarily a judgment which is reviewable under 28 *U.S.C.* §1257, and the reviewable judgment is that of the highest court possessing and exercising jurisdiction, which in this case is the Appellate Division of the New Jersey Superior Court. *Hammerstein v. Superior Court of California*, 341 *U.S.* 491, 492, 71 *S. Ct.* 820, 821, 95 *L.Ed.* 1135 (1951).

purpose for which the "Round Valley" property was originally purchased or the strict applicability of the "corporate opportunity" doctrine. (App. 30).

This Court may only correct state court judgments to the extent that they incorrectly adjudge federal rights. It has been the practice of this Court not to review state court judgments that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 *U.S.* 117, 125-126, 65 *S.Ct.* 459, 462-463, 89 *L.Ed.* 789 (1945); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 *U.S.* 562, 566, 97 *S.Ct.* 2849, 2852, 53 *L.Ed.*2d 965 (1977). In *Black v. Cutter Laboratories*, 351 *U.S.* 292, 298, 76 *S.Ct.* 824, 827, 100 *L.Ed.* 1188 (1956), this Court declined to consider federal questions that were discussed in the opinion of the highest state court but where the judgment rested on adequate state grounds. Even if a decision is ambiguous, this Court has chosen to avoid an interpretation that would involve a constitutional question. *Id.* at 299, 76 *S.Ct.* at 828, 100 *L.Ed.* at 1197.

In the instant case the Appellate Division's judgment clearly rested on state common law principles. Only the details of High Point's participation in the purchase and maintenance of the "Round Valley" property and a brief reference to the "corporate opportunity" doctrine are addressed in the decision *per curiam*. The court below thus relied solely on state grounds in reaching its conclusion and gave short shrift to petitioners' baseless constitutional claims.

The state court decisions in this case have merely transferred title to the subject property from petitioners to another private party, High Point, for a private use – to

help satisfy the corporation's statutory obligation for the closure of its landfill. The land was not taken by the NJDEP for any type of public use, nor was it regulated to inutility. Therefore, petitioners' writ is most definitely without merit factually and legally.

In the instant case, the trial court appointed the NJDEP Commissioner as Receiver of High Point pursuant to a specific provision in the SWM Act, *N.J.S.A.* 13:1E-9(d). He was not granted any of the authority of a receiver in an insolvency case,* but was only assigned the specific task of supervising the closure of High Point landfill, an activity for which the corporation was and is still financially liable. The appointment of a receiver in no way absolved the company of closure liability. In fact, it was the trial court's initial hope that the Company's solid waste hauling business would contribute its net profits to the closure expenses. The NJDEP Commissioner as Receiver was merely standing in the shoes of High Point by being awarded custody of "Round Valley" and permitted to sell all or any portion thereof to obtain the necessary funds for closure in satisfaction of the Company's obligations.

Petitioners' claim that the state court ruling resulted in their property being awarded to the State without just compensation or due process in violation of their federal constitutional rights is completely without merit. Firstly, as has been discussed earlier, title to the "Round Valley" property was transferred to *High Point* and not to the

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* See Section 4 of the New Jersey General Corporation Act, *N.J.S.A.* 14A:14-4(1).

NJDEP or the State. The NJDEP Commissioner was only given *custody* of the real estate in regard to fulfillment of his assigned task to supervise the closure of the High Point landfill, the closure of which had years before been determined as the corporation's statutory responsibility.* Thus, the Receiver was acting for High Point in accomplishing the closure.

Secondly, the decision to require the transfer of the "Round Valley" property to High Point was based on time-honored equitable principles. The original suit by NJDEP against High Point was filed in the Chancery division of the New Jersey Superior Court to enforce the SWM Act and the Closure Act. Equity will not suffer a wrong without a remedy. This is the "very foundation of equity." *Roberts v. Roberts*, 106 *N.J. Super.* 108, 109 (Ch. Div. 1969) See also *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 *U.S.* 166, 171, 46 *S.Ct.* 459, 472, 70 *L.Ed.* 357, 364 (1925), *Orland Properties, Inc. v. Broderick*, 94 *N.J. Super.* 307, 313-314 (Ch. Div. 1967) and *Cona v. Gower*, 89 *N.J. Super.* 510, 516 (Ch. Div. 1965). Courts of equity are endowed with the flexibility to adapt proceedings and remedies to the circumstances of each case. *Alexander v. Hillman*, 296 *U.S.* 222, 239, 56 *S.Ct.* 204, 209-210, 80 *L.Ed.* 192, 199 (1935).

By ordering the transfer of title to High Point, the trial court was fashioning the appropriate remedy for an obvious wrong. The judge noted that

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* No appeal was taken by either High Point or any of the De Lorenzos from the Order Appointing Receiver in 1984.

> going back to the time of the purchase in 1975, this corporation equitable [sic] was the owner of the Round Valley tract because from the very beginning most of the funds used to purchase the tract came from the corporation. [App. 21].

By so ruling, the court took full advantage of the equitable principles with which it was instilled and fashioned the only appropriate remedy – giving the corporation legal title to a piece of property in which it already possessed equitable title.

Lastly, the cases that petitioners rely upon to support their claim are irrelevant in the context of the instant petition and merely complicate a relatively simple case unnecessarily. Those cases concern either states' claims to title of riparian or tidal lands or the creation of a public easement as a condition to development of beachfront property. Compare the fact of this case to *Nollan v. California Coastal Comm'n*, ___ *U.S.* ___, 107 *S.Ct.* 3141, ___ *L.Ed.*2d ___ (1987) (State imposed condition on permit to develop beachfront property located between two public beaches that property owner concede to a public easement to allow access across beach); *Hughes v. State of Washington*, 389 *U.S.* 290, 88 *S.Ct.* 438, 19 *L.Ed.*2d 530 (1967) (Action by owner of upland property that had been conveyed by the federal government prior to statehood against the State to determine ownership of accretions that had gradually formed by the ocean along the property); *Bonelli Cattle Co. v. Arizona*, 414 *U.S.* 313, 94 *S.Ct.* 517, 38 *L.Ed.*2d 526 (1973) (Suit to determine whether title to land that had been abandoned by a stream of the Colorado River due to federal rechanneling project vests in State as owner of beds under navigable streams within its borders or cattle company as owner of land riparian to

the River at the time of rechanneling); *Sotamura v. County of Hawaii*, 460 *F. Supp.* 473 (D. Hawaii 1978) (Action to determine the seaward boundary of beachfront property under state law); *Robinson v. Ariyoshi*, 441 *F. Supp.* 559 (D. Hawaii 1977), aff'd., 753 *F.*2d 1468 (9th Cir. 1985), vacated on other grounds, 477 *U.S.* 902 (1986) (Suit to determine whether surplus water from rivers belonged to State or property owner).

In the case *sub judice* the State has not asserted any property right to the "Round Valley" property. Title was transferred to High Point, a corporation for which a receiver was appointed only to carry out its closure responsibilities. The appointment of a receiver did not exonerate High Point from its statutory obligation to provide the necessary monies for the closure.

Thus, the circumstances of the instant appeal clearly dictate that this dispute stemmed from the improper use of corporate funds to purchase a parcel of land situated adjacent to the corporation's landfill, title to which was wrongfully placed in the names of the individual shareholders, officers and directors. By ordering the transfer of title to High Point and allowing the Receiver to use the property to help satisfy the corporation's responsibility under state law for the proper and safe closure of its sanitary landfill, the state trial court was exercising its equity jurisdiction under state law to remedy a decided wrong between private parties and permit the use of the land to satisfy a private statutory obligation. Both the lower and appellate court judgments rested solely on state grounds. Title to the "Round Valley" property was

clearly not taken by the State for any public use. Therefore, petitioner' federal rights were not implicated by the state court decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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